Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-429

SOHIO PETROLEUM COMPANY,
Petitioner,

vs.

OIL TRANSPORT COMPANY and GREENVILLE TOWING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1971

No. .....

SOHIO PETROLEUM COMPANY,
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vs.

OIL TRANSPORT COMPANY and GREENVILLE TOWING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 29, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit entered June 29, 1971, is not yet reported but is appended hereto as Appendix "A", infra, page A1.

The opinion of the District Court for the Northern District of Mississippi dated February 12, 1970, is not reported but is appended hereto as Appendix "B", infra, page A11.

The opinion of the Court of Appeals for the Fifth Circuit dated May 15, 1967, is reported at 376 F.2d 1011 and is appended hereto as Appendix "C", infra, page A19.

The opinion of the District Court for the Northern District of Mississippi dated June 29, 1966, is reported at 255 F.Supp. 972 and is appended hereto as Appendix "D", infra, page A21.

The opinion of the Court of Appeals for the Fourth Circuit in the case of *General Electric Company* v. *Moretz*, dated September 16, 1959, is reported at 270 F.2d 780 and is appended hereto as Appendix "E", infra, page A38.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 29, 1971 (Appendix "A", infra, page A2). The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

1. Is the *Ryan* doctrine of indemnity for breach of implied warranty of workmanlike service available to shippers of cargo upon the inland waterways of the United States?[1]

2. In view of the inter-circuit conflict between the Court of Appeals for the Fourth Circuit and the Court of

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1. *Ryan Stevedoring Company* v. *Pan Atlantic S.S. Corporation*, 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956).

Appeals for the Fifth Circuit over application of the *Ryan* doctrine, which position should be uniformly applied throughout the United States?

STATEMENT

Sohio Petroleum Company had a quantity of crude oil to move from the producing fields in Wyoming to its refinery in Kentucky. A combination of transportation modes was required for this movement; by pipeline from the Wyoming fields to Wood River, Illinois, thence down the inland waterways by river barge to Mayersville, Mississippi, and thence overland again by pipeline to Kentucky.

To handle the river portion of the movement, Sohio went into the transportation market and selected Oil Transport Company. This carrier was experienced in moving this particular kind of crude oil. A contract covering the movement was confected and the movement began.

At intervals when equipment of Oil Transport was not available, it subcontracted individual shipments to others. In the instance which gave rise to this litigation, it "subcontracted" with Greenville Towing Company.

On September 7, 1961, Greenville Towing's tow docked at the Sohio terminal in Mayersville and began unloading its cargo. In command was Greenville Towing's general manager. Sohio's terminal manager, although present, did not supervise or direct any part of the cargo discharge procedures. During the unloading operation, two young seamen lost their lives.

This case had its genesis in 1963 when the survivors of the two seamen sued Sohio for damages for the wrongful death of the two young men. Jurisdiction was based on diversity of citizenship. Sohio answered and impleaded

Oil Transport and Greenville Towing under the transportation contract which existed between the parties.

The Trial Court severed the issues raised by Sohio's impleading petition and trial proceeded on the complaint of the decedents' survivors, resulting in a final judgment in favor of Sohio. *Hobart* v. *Sohio,* 255 F.Supp. 972, 1966 (Appendix "D", infra, page A37).

The judgment was affirmed, per curiam, by the Court of Appeals for the Fifth Circuit. *Hobart* v. *Sohio,* 376 F.2d 1011, 1967 (Appendix "C", infra, page A20).

Sohio then revived, by appropriate motion, the issues which had been raised in its impleading petition and the sole issue before the District Court during the second phase of the case was the right of Sohio to recover its attorneys' fees and litigation expenses incurred in its successful defense of the wrongful death action.

The basis for Sohio's claim against Oil Transport and Greenville Towing was the contractual relationship existing among the three of them when the young seamen died.

Sohio's contract with Oil Transport contained the following clause added to the printed form:

> "Carrier will load and discharge tow".

Oil Transport was the denominated carrier. Stricken from the printed contract was the clause:

> "Charterer shall load and discharge tow at its sole risk and expense and shall furnish all equipment necessary therefor".

By "Charterer" was meant Sohio. It was and is Sohio's contention at the trial level and here that the deletion and special addition to the contract clearly indicated that Oil Transport was to be responsible for all loading and unload-

ing of the cargo and that this necessarily meant responsibility for all risks which attended such activities.

Accordingly, Sohio contended that Oil Transport and/or Greenville Towing could be called upon to indemnify it for the loss sustained in defense of the original wrongful death action. In doing so, it invoked the doctrine enunciated in the *Ryan* case and its progeny.[2]

The Trial Court, on this narrow issue, after examining the facts and the pleadings, stated:

> "It is clear to the Court that the case sub judice would be controlled by *Ryan*, and its progeny, if the facts of the case bring it within the scope of (the) rule."

The Court then went on to place this case outside of *Ryan* because the original claim had not been based upon an act of negligence, or failure to perform a duty, on the part of the carriers, Oil Transport and/or Greenville Towing, but was instead based on alleged acts of negligence committed by Sohio, the shipper and owner of the cargo. *Hobart* v. *Sohio* (Appendix "B", infra, page A18).

Upon Sohio's appeal from the judgment of the District Court, the Court of Appeals affirmed the District Court judgment but for reasons different from those given by the Trial Court in its opinion. Specifically, the Fifth Circuit concluded that this is not a *Ryan* case at all. *Hobart* v. *Sohio* (Appendix "A", infra, page A8).

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2. *Ryan Stevedoring Company* v. *Pan Atlantic S.S. Corporation*, 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Fifth Circuit below involves a direct conflict with the decision of the Court of Appeals for the Fourth Circuit in the case of *General Electric Company* v. *Moretz*.[3] In that case, Moretz, an employee of Mason and Dixon Lines, Inc., a common carrier, sued General Electric Company for personal injury suffered by him when cargo placed in his truck by employees of General Electric shifted during transit overturning his truck and injuring him.

General Electric denied any liability and impleaded Moretz' employer, Mason and Dixon Lines, claiming indemnity for any damages recovered by Moretz. The question of indemnity came before the Court on the motion of General Electric to set aside the verdict. The trial judge overruled this motion because the contract between the shipper, General Electric, and the carrier, Mason and Dixon, gave General Electric no such right of indemnity.

The Court of Appeals for the Fourth Circuit reversed. It looked not only to the Bill of Lading covering the shipment which was issued under a published tariff, but also regulations of the Interstate Commerce Commission, which imposed specific duties upon the carrier of cargo of that nature. The Court held that the provisions of the various statutes and regulations promulgated thereunder, as well as provisions of the applicable tariff, formed part of the contract between the shipper and the carrier so as to

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3. *General Electric Company* v. *Moretz*, 270 F.2d 780, 1959, cert. denied [*Mason and Dixon Lines* v. *General Electric Company*] 361 U.S. 964, 80 S. Ct. 593, 4 L. Ed. 2d 545 (1960), Appendix "E", infra, page A38.

oblige the carrier to load and secure the cargo safely so that it would not shift during the movement and to become liable for any loss caused by its failure to carry out this undertaking, unless excused by the concurring negligence of the shipper. The Court of Appeals for the Fourth Circuit then went on to say that the initial failure of the shipper to load the goods properly in no way prevented the carrier from carrying out its own statutory contractual duties and that the language of the applicable tariff was obviously inserted as part of the consideration moving from the shipper for the carriage of the goods at the published rate. Furthermore, the Court said that clearly the carrier was not excused from carrying out its primary obligation to the shipper to make certain that cargo delivered to it would not cause injury or damage because of a dangerous condition resulting from the shipper's own negligence to perform its duties of safe carriage.

Under these circumstances, it was clear to the Court of Appeals for the Fourth Circuit that General Electric was entitled to indemnity from the carrier and the Court illustrated this right by calling up the analogous situation which arises between longshoremen, shipowner and stevedoring company as illustrated in the *Ryan* case. The Court quoted extensively from *Ryan* and noted the subsequent development of *Ryan*ism in *Weyerhaeuser*[4] and in *Crumady*[5] as well as its own decisions in *Calmar*[6] and *Revel*.[7] The Court said that it was plain the default of

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4. *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 1958, 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491.

5. *Crumady* v. *The Joachim Hendrik Fisser*, 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

6. *Calmar Steamship Corp.* v. *Nacirema Operating Co.*, 4th Cir., 1956, 266 F.2d 79, cert. denied, 361 U.S. 816, 80 S. Ct. 56, 4 L. Ed. 2d 62, 1959.

7. *American Export Lines, Inc.* v. *Revel*, 4th Cir., 1959, 266 F.2d 82.

General Electric in that case was no greater than that of the shipowner in the cited cases.

II.

The Trial Court in the present case relied on *Moretz* as the basis for its holding that this was a *Ryan*-type case. The Fifth Circuit, on the other hand, did not approve this view at all. Instead, it specifically concluded that this is not a *Ryan* case at all. In so saying it footnoted the remark that the Trial Court may have been correct in its conclusion that the *Moretz* case would have encompassed the instant shipper-carrier relationship but that the Fifth Circuit had never gone as far as the Fourth Circuit had done in *Moretz*. In fact, the Fifth Circuit indicated that *Moretz* has been criticized and distinguished almost as often as it has been followed, citing for this statement an article from the Insurance Counsel Journal and the *Halstead*[8] and *Casella*[9] cases from the Fourth Circuit.

In *Halstead,* the injured plaintiff sued the railroad company which sought indemnity from his employer by third party action. The Bill of Lading and applicable tariff rules and regulations required the employer to load and unload the railroad cars. Halstead had been injured by the concurrent negligence of both the railroad and his employer. On motion for summary judgment, the Trial Court denied indemnity to the railroad and the Court of Appeals for the Fourth Circuit agreed. That Court distinguished the Halstead facts from those in *Moretz* because in *Moretz* the applicable tariff imposed specific duties on the carrier to load and unload cargo, the shipper

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8. *Halstead* v. *Norfolk and Western Railway Co.* v. *Anderson's-Black Rock, Inc.*, 4th Cir., 1965, 350 F.2d 917.

9. *Casella* v. *Norfolk and Western Railway Co.*, 4th Cir., 1967, 381 F.2d 473.

was seeking indemnity from the carrier for losses incurred from improper loading of the truck, and the carrier was contractually engaged in the performance of a service for the shipper when the injury occurred.

On the other hand, in *Halstead,* the carrier was under no duty to load or unload the cargo, the carrier was seeking indemnity from the shipper for losses sustained because of its admitted negligence and the shipper was not obligated to perform any service for the carrier and was performing none at the time of the injury. In short, this diametrically opposed factual situation in *Halstead* made it impossible for the Court of Appeals for the Fourth Circuit to apply the *Moretz* principles to that case.

In *Casella* there was no negligence on the part of the carrier and its facts differed so significantly from those in *Moretz* that the Fourth Circuit Court of Appeals could not and did not apply the *Moretz* principles.

III.

Later, the Fourth Circuit did have opportunity to apply and follow the *Moretz* principles in a case involving work done by a shipyard while deactivating a vessel. An employee of the shipyard sued the owner of the vessel for injuries sustained while that work was going on. The shipowner sought indemnity from the yard for legal expenses incurred in the successful defense of the suit. The District Court awarded indemnity, stating outright that the right to indemnity is not confined to the admiralty field or to the issue of seaworthiness of a vessel, citing and quoting extensively from the *Moretz* case.[10] The Court of Appeals for the Fourth Circuit affirmed[11] and said

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10. *Bielawski* v. *American Export Lines,* E.D. Va., 1963, 220 F.Supp. 265.

11. *American Export Lines* v. *Norfolk Shipbuilding and Dry Dock Corporation,* 4th Cir., 1964, 336 F.2d 525.

that while there is no direct authority holding the *Ryan* warranty applicable in a shipyard—ship contract, there is no sound reason to say that it is not, citing *West* v. *United States.*[12]

IV.

The Court of Appeals for the Fifth Circuit has repeatedly limited the right to indemnity under the *Ryan* doctrine to cases involving the unique, non-delegable duty of a shipowner to provide a seaworthy vessel, and that Court has been disinclined to extend the *Ryan* doctrine beyond those controversies involving the special rules governing the obligations and liability of shipowners.[13]

This inflexible position has been taken in spite of the strong language in *Ryan* that the warranty of workmanlike service is comparable to a manufacturer's warranty of the soundness of its manufactured products. Significantly, the *Ryan* opinion itself gives no indication that its holding is to be restricted to factual circumstances as between shipowner and stevedore. The Supreme Court had granted certiorari because of the "wide application" of the case and nothing in the opinion intimates that its holding rests on the admiralty character of the case. The analogy to the warranty of a manufacturer of goods is evidence of the Court's reliance on general legal principles.

In the Fifth Circuit itself, there is an absence of unanimity as exemplified by Judge Rives' vigorous dissent from the position of the majority limiting *Ryan* to ad-

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12. *West* v. *United States*, 1959, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161.

13. *Ocean Drilling and Exploration Company* v. *Berry Bros. Oil Field Service*, 5th Cir., 1967, 377 F.2d 511, cert. denied, 1967, 389 U.S. 849, 88 S. Ct. 102, 19 L. Ed. 2d 118.

miralty-type cases in *Halliburton Company* v. *Norton Drilling Company*.[14]

This Court's decision in *Italia Society* v. *Oregon Stevedoring Company*[15] lends support to the philosophy that *Ryan* is not especially limited to shipowner-stevedore situations as the Court placed ultimate liability upon the party "best situated to adopt preventive measures and thereby reduce the likelihood of injury".

In the case at hand, the injury producing devices or things—the barges, the pumps, the defective suction lines, the crude oil—all were under the exclusive supervision and control of the carriers. They were the ones best situated to adopt preventive measures and thereby reduce the likelihood of injury. On the other hand, the shipper was powerless to minimize the risk.

V.

The effect of the *Ryan* rule upon the transportation business has been substantial. The net effect has been for marine contractors to adopt safety measures for the handling of various kinds of cargoes, usually at the insistence of their insurance underwriters or of government regulatory agencies.

The safety regulations promulgated by the Coast Guard, and applicable in this case, reflect the concern of that regulatory agency for the safety of employees of crude oil carriers. The regulations are issued under statutory

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14. *Halliburton Company* v. *Norton Drilling Company*, 5th Cir., 1962, 302 F.2d 431, cert. denied, 1963, 374 U.S. 829, 83 S. Ct. 1870, 10 L. Ed. 2d 1052.

15. *Italia Society* v. *Oregon Stevedoring Company*, 1964, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732.

authority[16] and they include such things as markings on hatchways, flame arresters, gas masks, safety lines, "gas-free" certificates, licensed tankerman, and the like.

These regulations, existing at the time the contract between Sohio and Oil Transport was confected, became a part of it and must be read into it just as if they were expressly referred to or incorporated in its terms.[17]

On the night of the casualty, a licensed tankerman was not on duty, flame arresters were not in position and safety lines and gas masks were not readily available. These measures, required by the regulations to be adhered to by the carriers, were absent and their absence led to the loss. Thus, these carriers had unique, absolute, non-delegable duties toward their own employees, as well as to Sohio, to load, unload and transport this cargo safely. Their failure to carry out these duties resulted in the loss of two young lives. Under the *Moretz* doctrine, if the casualty had occurred in the Fourth Circuit, Sohio's right to indemnity would be clear cut and unassailable. But because of a queer quirk of geography, because it happened within the Fifth Circuit, Sohio has been denied its right to indemnity. This result is patently unfair.

VI.

In all instances where the *Ryan* rule has been invoked, it has placed ultimate liability upon the party best positioned to prevent injury. In this case, the employer-carriers were best positioned. The Coast Guard regulations covered their mode of operations and were promulgated

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16. R.S. 4405 and 4417a, as amended and Section 3(c) of the Act of August 9, 1954 (46 U.S.C. 375, 391a, 50 U.S.C. 198).

17. Cf. footnote 5, Page 787, *General Electric* v. *Moretz*, infra, Appendix "E", pages A48-A49.

and designed to prevent this kind of injury on boats and barges operated by them. The carriers alone could rigidly enforce the regulations. Sohio was powerless to do so.

Application of the *Ryan* rule to the case at hand is both necessary and logical. The particular reasons why it covers this situation are:

(1) The shipper offered the movement of its goods to the carrier market for acceptance.

(2) The shipper contracted with the most willing and experienced carrier available in the market.

(3) The experienced carrier furnished the appropriate equipment to perform the contract.

(4) During the shipment, the crude oil was under the exclusive care, custody and control of the crew of the carrier's tug.

(5) Responsibility for workmanlike loading, carriage and unloading was upon the tug and its crew.

(6) The shipper had to rely on the experience and know-how of the tug and its crew.

(7) Losses, including cost of defense, borne by the shipper as a result of the tug's breach of its duty to unload in a workmanlike manner ought to be reimbursed by the tug.

The expert carriers in this case were obliged, explicitly under the contract, to be responsible to load and unload the cargo. This necessarily meant to be responsible for all risks which attended such activities. One of those risks would involve the safety of its own employees during such loading or unloading activities. To adequately shoulder that risk meant to follow the Coast Guard regulations and to unload the crude oil cargo in such a

workmanlike manner as not to cause injury to their own employees, but if injury did result, to indemnify or make whole the party which had been put to any expense for having shouldered the risk on the carrier's behalf.

This obligation to protect the safety of its own employees is non-delegable and is more akin to the shipowner's absolute non-delegable liability under the seaworthiness guaranty than to a manufacturer's warranty of the soundness of his manufactured product.

VII.

The decision of the Court below conflicts with the principle followed by the Fourth Circuit in the *Moretz* case and thus gives rise to the necessity for the settlement by this Court of the disputed question.

In *Moretz* the "control" factor was sufficient to justify invocation of the *Ryan* doctrine upon the carrier.

But contrariwise, the Fifth Circuit does not think that the "control" element alone is sufficient to invoke *Ryan*.

The uncertainty created in the transportation industry by these two diametrically opposed opinions is large indeed, an uncertainty that will undoubtedly lead to much litigation, particularly from the towing operations on the inland waterways which are increasing yearly by leaps and bounds.

Whereas, a shipper within the jurisdiction of the Fourth Circuit can look with confidence upon the *Moretz* doctrine to provide a remedy by indemnity against a negligent or careless carrier, that is not the case with a shipper in the jurisdiction of the Fifth Circuit. Or stated another way, a carrier in the Fourth Circuit must be more careful in fulfilling a transportation contract than his counterpart in the Fifth Circuit.

This dichotomy between the Circuits cannot lead to orderly administration or uniform application of our laws. It can lead only to confusion and defeat of those noble purposes.

It is submitted that not only the exigencies of the present litigation, but the exigencies of the development of the maritime law require this Court to consider this important issue. Only with an authoritative decision of this Court can the limit to which *Ryan* is to be extended be determined, and the sooner this question is settled, the quicker the maritime law in this area will have its course charted in the proper channel and on smooth seas which will permit the towing industry, both tug and tow alike, and the shippers with whom the industry contracts, to proceed full speed ahead with each clearly understanding its rights and liabilities.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
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801 First National Bank Building
Vicksburg, Mississippi 39180

DATED: September ....., 1971.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Petition for Writ of Certiorari have been served on the attorneys for the respondents, Mr. Brunswick G. Deutsch, Deutsch, Kerrigan and Stiles, Hibernia Bank Building, New Orleans, Louisiana 70112, and on Mr. James L. Robertson, Campbell, DeLong, Keady, Robertson and Hagwood, 119 North Broadway, Greenville, Mississippi 38701, by depositing the same in United States Post Office with first-class, airmail postage prepaid to the address shown above on this the day of September, 1971.

WILLIAM G. BEANLAND
Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29575

D. C. Docket No. Civ. GC 6337-S

W. W. HOBART, Administrator of the Estate of Kenneth Ray McClure Hobart, Deceased, ET AL,
Plaintiffs,

versus

SOHIO PETROLEUM COMPANY,
Defendant-Third Party
Defendant-Appellant,

versus

OIL TRANSPORT COMPANY and GREENVILLE TOWING COMPANY,
Third Party Defendants-Third
Party Plaintiffs-Appellees,

versus

W. W. HOBART, ET AL,
Third Party Defendants.

Appeal from the United States District Court for the Northern District of Mississippi

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Before RIVES, THORNBERRY and CLARK, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-third party defendant-appellant pay to third party defendants-third party plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

June 29, 1971

Issued as Mandate: July 21, 1971.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29575

W. W. HOBART, Administrator of the Estate of Kenneth Ray McClure Hobart, Deceased, ET AL,
Plaintiffs,

versus

SOHIO PETROLEUM COMPANY,
Defendant-Third Party
Defendant-Appellant,

versus

OIL TRANSPORT COMPANY, and GREENVILLE TOWING COMPANY,
Third Party Defendants-
Third Party Plaintiffs-Appellees,

versus

W. W. HOBART, ET AL,
Third Party Defendants.

Appeal from the United States District Court for the Northern District of Mississippi

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(June 29, 1971)

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: In this appeal we are presented with the question whether the indemnity doctrine enunciated in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956), may

be invoked against a shipowner and in favor of a shipper who has been sued for the wrongful death of the shipowner's employees. The appeal is taken from district court's denial of the shipper's third-party complaint against the shipowner.

The salient facts are as follows: In 1961, Sohio Petroleum Company (Sohio) contracted Oil Transport Company to ship a quantity of crude oil from Sohio's producing fields in Wyoming to its refinery in Kentucky. Oil Transport, in turn, subcontracted certain individual shipments of the Sohio cargo to Greenville Towing Company. On September 7, 1961, the *M/V Walter Williamson,* a vessel belonging to Greenville Towing, along with its tow, the barges GTC-3, -4, and -5, containing some of the aforementioned shipments of Sohio crude oil, docked at the Sohio Terminal in Mayersville, Mississippi. The plaintiffs' decedents, crewmembers of the *M/V Walter Williamson,* were engaged in discharging the cargo at Mayersville. In the course of their duties, the decedents entered the hold of one of the barges, were overcome by hydrogen sulfide gas fumes from the cargo, and died. The plaintiffs made claims directly against Greenville Towing for the deaths of the two seamen, and a settlement of those claims was effected, in exchange for which Greenville Towing secured a release from the plaintiffs and an indemnity agreement whereunder the plaintiffs agreed to hold Greenville Towing harmless should it be impleaded by Sohio in any proceedings instituted by plaintiffs against Sohio. Plaintiffs did file suit against Sohio, on the theory that Sohio, as the shipper, owed a common law duty to warn plaintiffs' decedents of the toxic nature of its oil shipment and breached that duty. Sohio answered and filed a third-party complaint against Oil Transport and Greenville Towing, asserting that if it was liable to plaintiffs for anything, such

liability was solely caused by the fault of Greenville Towing and Oil Transport, and they should bear the liability. Greenville Towing answered the third-party complaint, and *inter alia,* counterclaimed and cross-claimed against the plaintiffs, relying on its indemnity agreement with the plaintiffs.

The court below severed the issues between plaintiffs and Sohio from the remaining issues between Sohio and Greenville Towing, etc., and stayed proceedings on those remaining issues until the issues between plaintiffs and Sohio were resolved. The trial between plaintiffs and Sohio resulted in a final judgment in favor of Sohio, affirmed by this Court on May 15, 1967. *Hobart v. Sohio Petroleum Company,* N.D. Miss. 1966, 255 F. Supp. 972, *aff'd,* 5th Cir. 1967, 376 F.2d 1011.

Upon revival of the remaining issues between Sohio and Greenville Towing, etc., the principal question before the district court was whether Sohio could recover its attorneys' fees and litigation expenses incurred in the successful defense of the plaintiffs' wrongful death action.

Sohio pursued only one theory of recovery in its claim for indemnity against Greenville Towing and Oil Transport: That there exists on the two shipowners' part a *Ryan*-type implied warranty of workman like performance arising out of Greenville's and Oil Transport's contractual obligations to carry, load and discharge the Sohio cargo.[1] The trial court found, and Sohio does not dispute,

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1. Although the parties have not been specific about which law they would have this Court apply to Sohio's third-party claim—federal maritime law or Mississippi law—it is clear from the pleadings below and from their briefs, which cite only federal cases, that they have drawn a federal maritime boundary around the third party claim. Sohio has neither alleged nor argued that any Mississippi law would entitle it to indemnification from

that the contracts between Sohio and Oil Transport, and Oil Transport and Greenville, contain *no express indemnity provisions*. The trial court did conclude, however, that this was a *Ryan*-type case.[2] Nonetheless, the trial court held that under the facts of the case, *Ryan* could not be

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Greenville Towing or Oil Transport. Sohio has taken this position notwithstanding that the plaintiffs' suit against Sohio began not as an admiralty suit, but as a diversity suit predicated on theories of common law negligence as applied in Mississippi. *See Hobart v. Ohio Petroleum*, N.D. Miss. 1966, 255 F. Supp. 973, 974-75. Sohio's Choice to pursue a remedy developed under federal maritime law (*Ryan*), of course, is not precluded by the fact that plaintiffs' suit against Sohio fell on the "civil" side of the court below. *See Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 3d Cir. 1964, 339 F.2d 673, *cert. denied*, 382 U.S. 812, 86 S.Ct. 23 (1965). We have deferred to Sohio's choice on this point, and have not ourselves explored the existent, or nonexistent, remedies which might be available to Sohio under Mississippi law. *Compare Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 5th Cir. 1970, 420 F.2d 1103; *General Electric Co. v. Cuban American Nickel Co.*, 5th Cir. 1968, 396 F.2d 89.

2. In holding that this case would be controlled by *Ryan* and its progeny, the trial court relied primarily on *General Electric Co. v. Moretz*, 4th Cir. 1959, 270 F.2d 780, *cert. denied sub nom., Mason & Dixon Lines, Inc. v. General Electric Co.*, 361 U.S. 964, 80 S.Ct. 593 (1960). The *Moretz* case has been referred to as "[p]erhaps the leading case expanding the *Ryan* doctrine's application to nonmaritime situations." *General Electric Co. v. Cuban American Nickel Co.*, 5th Cir. 1968, 396 F.2d 89, 92. *Moretz* required a carrier (trucker) to indemnify a shipper for damages recovered against the shipper by one of the carrier's employees who was injured because of the negligent loading of the shipper's cargo in the carrier's truck. The trial court may have been correct in its conclusion that the *Moretz* case would have encompassed the instant shipper-carrier relationship but this Circuit has never gone as far as *Moretz*. Indeed, the *Moretz* case has been roundly criticized, Dykes, *Contractual Indemnity*, 27 Ins. Couns. J. 327, 328 (1960), and distinguished almost as often as it has been followed. *Casella v. Norfolk and Western Ry. Co. v. Anderson's-Black Rock, Inc.*, 4th Cir. 1965, 350 F.2d 917.

applied because "the demand contained in the . . . [plaintiffs' complaint against Sohio] is not bottomed on an act of negligence, or failure to perform a duty, on the part of the carriers, or either of them, but rather on alleged acts of negligence committed by the shipper, the owner of the cargo . . ." Therefore, the trial court denied Sohio's motion for indemnification against Greenville Towing and Oil Transport. We affirm, but for reasons different from those given by the trial court. *Hill v. City of El Paso*, 5th Cir. 1971, 437 F.2d 352, 354. Specifically, we conclude that this is not a *Ryan* case at all.

Our task on this appeal is to review the *Ryan* doctrine and its underlying policies in the light of the facts now before us, and decide whether those facts present a *Ryan*-type problem calling for a *Ryan*-type solution. In the *Ryan* case itself, the Supreme Court held that a stevedoring contractor who enters into a services agreement with a shipowner is liable to indemnify the shipowner for any damages sustained as a result of the stevedore's breach of its warranty of workmanlike service. Subsequent decisions have elaborated on the doctrine enunciated in *Ryan*, explaining more clearly than *Ryan* did itself the underlying reasons for the doctrine. These cases make it clear that the *Ryan* doctrine is designed to serve special problems in maritime law arising from the absolute and non-delegable duty of seaworthiness which general maritime law imposes upon all vessel owners. Thus, under *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946) the shipowner is liable for unseaworthiness regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended. This liability extends to longshoremen and others who work aboard the vessel, including those in the employ of stevedoring companies. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80

S.Ct. 926 (1960); and if the owner engaged others who supply equipment necessary for stevedoring operations, he must still answer to the longshoreman if the gear proves unseaworthy. *Alaska S.S. Co. v. Petterson*, 347 U.S. 396, 74 S.Ct. 601 (1954). When a shipowner has turned his vessel over to a stevedoring company, however, and shipboard injuries result, it obviously seems unjust to hold the shipowner absolutely liable when he was, at the time of the accident, in no position to prevent the injuries. It is to alleviate the harshness of *Sieracki* absolute liability against shipowners in situations when the shipowner has relinquished control of his vessel and another party is better situated to prevent losses caused by shipboard injuries that *Ryan* indemnification is imposed. This, at least, is the message of Supreme Court opinions following *Ryan*. *See, e.g., Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748 (1964).

On its facts, the instant case is easily distinguishable from *Ryan*. In *Ryan* the third-party complaint was filed *by* the shipowner, the indemnitee, and against the contracting stevedore company, the indemnitor. In our case, the third-party complaint has been filed *against* the shipowner, and by the shipper of the cargo being transported. The appellees, Greenville Towing and Oil Transport, argue that this factual distinction is fundamental. *Ryan*, they contend, was designed to give shipowners much needed protection from the *Sieracki* doctrine. Thus, they urge, it should be limited to claims for indemnification by shipowners, and definitely should not be applied *against* shipowners. Pressing further their "protection" argument, they point out that while Sohio, the shipper here, was subject like any other tortfeasor to liability to any person injured by its negligence, its legal duties were not even comparable to the absolute nondelegable duty of a shipowner. Thus, Sohio's need for protection in the form of an

indemnity doctrine is by no means as great as the shipowner's need for protection in the *Ryan*-situation, and should not be supplied.

Sohio, on the other hand, stresses not the "protection" aspect of the *Ryan-Italia* rationale, but rather urges that *Ryan* should be applied because Greenville Towing had exclusive supervision and control of the cargo at the time the accident occurred, and was "best situated to adopt preventive measures and thereby reduce the likelihood of injury." *Italia Societa, supra,* 376 U.S. at 324, 84 S.Ct. at 754.

Sohio's emphasis on Greenville Towing's control of the cargo is not misplaced, for *Italia* does indeed stress the "control" factor. But Sohio's argument does not go far enough. The *Ryan* doctrine is an extraordinary doctrine, imposing a substantial and heavy burden on stevedores or others similarly situated. Personal injuries frequently may be causally connected to the distinct activities of more than one tortfeasor. But not always is one entitled to automatic indemnification from the other. Even if one party has "control" of the situation at the time that the injury occurs, it does not always follow that he will be absolutely liable to indemnify all other persons who might be causally connected with the injury. In other words, we do not think that the "control" element alone is sufficient to justify invocation of the *Ryan* doctrine. Our reading of the many cases decided in this Circuit involving the *Ryan* doctrine convinces us that the predicate of the doctrine is the shipowner's absolute nondelegable liability under the seaworthiness guaranty. *See e.g., Lofland Bros. Co. v. Roberts,* 5th Cir. 1967, 386 F.2d 540, at 549, *cert. denied,* 389 U.S. 1040, 88 S.Ct. 778 (1968) ["The shipowner owes a non-delegable duty to provide a seaworthy vessel and its liability is not dependent on a finding of fault . . . .

Recognizing this unique obligation on the part of a shipowner, we have held that the *Ryan* doctrine is closely tied to a vessel and this obligation which the shipowner owes to those employed on the vessel."]; *Central Stikstof Verkoopkanter v. Walsh Stevedoring,* 5th Cir. 1967, 380 F.2d 523, 529 ["The implied warranty established in *Ryan* . . . is tied closely to the duties and obligations which the admiralty law imposes on shipowners with respect to those employed by and who work on a ship."]; *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service,* 5th Cir. 1967, 377 F.2d 511, at 513, *cert. denied,* 389 U.S. 849, 88 S.Ct. 102 (1967), [". . . we have hesitated . . . to extend [the *Ryan* doctrine] beyond those controversies involving the 'special rules governing the obligations and liability of shipowners' which necessitated its formulation and justify its application."]. *See also Smith Petroleum Service, Inc. v. Monsanta Chemical Co.,* 5th Cir. 1970, 420 F.2d 1103. *Delta Engineering Corp. v. Scott,* 5th Cir. 1963, 322 F.2d 11, *cert. denied,* 377 U.S. 905, 84 S.Ct. 1164 (1964). We therefore decline Sohio's invitation to extend the *Ryan* doctrine to a shipper who, as the result on the merits in the instant action between plaintiffs and Sohio reflects, owes no more than an ordinary duty to act as would a reasonably prudent person.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

W. W. HOBART, Administrator of the Estate of Kenneth Ray McClure Hobart, Deceased; and H. L. JONES, Administrator of the Estate of Roy Lorenzo Jones, Deceased,
Plaintiffs

v.

SOHIO PETROLEUM COMPANY, a corporation,
Defendant and Third-Party Plaintiff

v.

OIL TRANSPORT COMPANY, INCORPORATED, and GREENVILLE TOWING COMPANY,
Third-Party Defendants and Third-Party Plaintiffs

v.

W. W. HOBART, TINA MAE HOBART, GUY JONES, and BESSIE WORTHY JONES,
Third-Party Defendants

No. GC 6337-S

Memorandum Opinion

(February 12, 1970)

This action was initiated on August 21, 1963 with the filing of a complaint by plaintiffs against Sohio

Petroleum Company (hereinafter called "Sohio"), defendant, seeking to recover damages in an action for the alleged wrongful death of decedents, W. W. Hobart and Roy Lorenzo Jones.

Sohio answered and filed a third party complaint against Oil Transport Company, (hereinafter called "Oil Transport") and Greenville Towing Company, (hereinafter called "Greenville").

Greenville answered the third party complaint and included a "Counterclaim and Crossclaim" against the original plaintiffs. Greenville also filed a third party complaint against the next of kin of decedents.

Sohio moved for summary judgment, on plaintiffs' complaint and also for summary judgment on its third party complaint against Oil Transport and Greenville.

Oil Transport moved, in advance of answer, for a summary judgment on Sohio's third party complaint, and Greenville filed a similar motion.

The Court, through Chief Judge Claude F. Clayton, now deceased, overruled Sohio's motion insofar as it was directed to the plaintiffs' complaint, and severed all issues except those between the original parties, reserving disposition on them pending determination of that original controversy. All further proceedings not encompassed in the original controversy were stayed.

A trial to the Court, sitting without a jury, resulted in a final judgment on the complaint in favor of Sohio. Hobart v. Sohio, 1966, 255 F. Supp. 972. The decision of the trial court was affirmed by the United States Court of Appeals, Fifth Circuit, Hobart v. Sohio Petroleum Corp., 1967, 5 Cir., 376 F.2d 1011.

The disposition of the main issue in favor of Sohio, renders moot all issues herein, except the issues involved

in Sohio's demand to recover attorney fees and litigation expenses incurred in the successful defense of the case in chief, and the parties have so stipulated.

The chain of events which ended in the death of Hobart and Jones began when Sohio contracted with Oil Transport to transport crude oil owned by it from Hartford, Illinois to Mayersville, Mississippi. Oil Transport in turn sub-contracted with Greenville for one voyage of tow laden with the crude oil, described in the pleadings as "Wyoming Sour Crude Oil".

On September 7, 1961, when Greenville's tow docked at Sohio's Mayersville terminal, an incident occurred which the trial court found resulted in the suffocation of Hobart and Jones.

The general manager of Sohio temporarily took command of unloading the cargo. While in command he directed the activities of the crew in the unloading operation. During this period Hobart and Jones entered the tank, where the oil was stored, and were suffocated.

The administrators of the deceased crewmen instituted this action against Sohio, charging that the Wyoming Sour Crude Oil was inherently dangerous, in that it contained large quantities of hydrogen sulfide, which in high concentration has a systemic effect and in acute poisoning, death is as rapid as in poisoning by cyanide; that Sohio knew or with the exercise of reasonable care should have known of the dangers inherent in Wyoming Sour Crude Oil; that Sohio was charged with the duty of warning the crew members of the tow of the dangers inherent in the oil, which it negligently failed to perform, resulting in the death of the decedents, and that when the tank barges docked at Sohio's terminal, agents and servants of Sohio took charge of and supervised the unloading operations.

In sum, the action was bottomed on alleged acts of negligence of Sohio. The complaint does not charge Oil Transport or Greenville with negligence or with a failure to perform any duty imposed upon either of them in the transportation or delivery of the oil.

Sohio charged in its third party complaint that Oil Transport contracted to safely transport the oil, which obligation Greenville assumed when it subcontracted for the movement of the oil in its tow. Therefore, Sohio contends, that should there be any liability imposed upon it, Oil Transport and Greenville must respond thereto.

Since Sohio successfully defended the original action, Sohio contends that Oil Transport and/or Greenville have implied obligations arising out of the contracts, executed by the parties, to transport oil between the two terminals in a workmanlike manner, and may be called upon to indemnify it for the loss sustained in defense of this suit.

The Court is faced with the issue of whether Sohio is entitled to recover from Oil Transport and/or Greenville the expenses incurred and paid by it in defending the action. A negative answer to the question presented will dispose of all issues in the case. The Court has determined the question must be answered in the negative, and Sohio must fail in its demand.

In the Liquid Cargo Charter Party between Sohio and Oil Transport, Oil Transport agreed to "load and discharge tow" and Sohio agreed to "furnish, free of wharfage and dockage charges, safe berths for loading and discharging promptly on arrival". Nowhere in the contract is there an express provision of indemnity. The demand of Sohio is bottomed on an implied warranty or agreement.

The case was tried to the Court solely on the issue of the negligence of Sohio. The trial court held that a shipper,

distributor, supplier, or other person is not under a legal duty to give warning of a fact of which the user is already aware. Crude oil, the court said, is, for more than one reason, an inherently dangerous substance, one latent danger being that it constitutes a fire hazard, another being that of suffocation. The court said, however, that, as these hazards are well known and necessarily appreciated throughout the petroleum line industry, Sohio was not under any duty to give a warning as to the hazards. The court further held that Jones and Hobart succumbed to a known danger, suffocation caused by the saturation of the atmosphere in the compartment of the barge where the oil was stored with hydrocarbon gases which drove out the necessary supply of oxygen.

The Court therefore exonerated Sohio.

In its claim for indemnity, Sohio relies heavily on Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp., 350 U S 124, 100 L ed 133, 76 S Ct 232 (1956), and its progeny.

Ryan involved in an action by an employee of a stevedoring contractor to recover from the shipowner damages resulting from improper stowage of cargo aboard ship, in which the shipowner filed a third-party complaint against the stevedoring contractor. The contractor contended that the Longshoremen's and Harbor Workers' Compensation Act,[1] limiting the contractor's liability to the compensation provided for in the act, barred the shipowner from recovering from it by way of indemnity the damages for which the shipowner had been held liable as a result of the contractor's breach of a contractual duty owed the shipowner.

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1. 33 U.S.C. §§ 901, *et seq.*

Two questions were considered by the court. First, whether the Longshoremen's and Harbor Workers' Compensation Act prevented the shipowner from recovering its loss from the contractor. The court answered this question in the negative. Second, whether the shipowner could recover from the contractor, where the contract did not contain an express provision of indemnity, but, where the contractor, contracting to perform the shipowner's stevedoring operations, breached the contract to safely stow the ship's cargo, which resulted in injuries to the longshoreman. This question was answered in the affirmative. The court held that the stevedoring agreement "necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken". 100 L ed 142. The decision of the court that the shipowner could recover was based on the premises that the stevedoring contractor warranted the performance of the contract with workmanlike service. The unsafe stowage of the cargo breached this warranty. It is to be noted, however, that the right to recover is bottomed on the negligence of the contractor in stowing the cargo in an unsafe manner.

However, to recover its loss or expense from a stevedore, the shipowner must show that the stevedore's breach of warranty occasioned the loss and the stevedore, in fact, breached its warranty and caused the injury for which the shipowner was potentially liable. Roderi A/B Dalen v. Maher, 4 Cir. 1962, 303 F.2d 565, American Export Lines v. Norfolk Shipbuilding Dry-Dock Corp., 4 Cir. 1964, 336 F.2d 525.

Sohio relies also on General Electric Co. v. Moretz, 4 Cir., 1959, 270 F.2d 780, where the court extended the rule of implied warranty of workmanlike service to a motor car-

rier. In this case the shipper, General Electric Company, negligently loaded into a trailer certain heavy electric equipment. The trailer was turned over to a pickup driver of the carrier who delivered it to the carrier's terminal, where it was sealed, without inspection, and turned over to Moretz, an over-the-road driver for the carrier. During the subsequent trip the improperly stowed cargo suddenly shifted as the vehicle rounded a turn in the road, causing the trailer to overturn and injure the driver. Moretz sued General Electric and recovered a judgment for $35,000. General Electric asserted a right to indemnity from the carrier, bottomed on the carrier's negligence in failing to inspect and secure the load before sending it over the road. The trial court found that General Electric was not entitled to a recovery from the carrier, unless the grounds therefor could be found in the contractual relationship between the parties. As the contract gave General Electric no such right, the trial court found in favor of the carrier. The Circuit Court reversed the District Court and entered a judgment for General Electric. While the rights of the parties rested to a great extent upon statutory and tariff provisions applicable to the case, the court quoted at length from *Ryan* and cases following in its wake. *Ryan's* rule had been adopted by the Fourth Circuit in Calmar Steamship Corp. v. Nacirema Operating Co., 4 Cir., 1959, 266 F.2d 79, and in American Export Lines, Inc. v. Revel, 4 Cir., 1959, 266 F.2d 82. In adopting *Ryan's* rationale, the court said:

> "It is plain that the default of the shipper in the pending case was no greater than that of the shipowner in the cited cases.
>
> "We reach the conclusion that the contract of Mason & Dixon for the carriage of the goods embraced the liability to indemnify General Electric in case it

suffered loss occasioned by the neglect of the carrier;" (270 F.2d 789)

It is clear to the Court that the case sub judice would be controlled by *Ryan*, and its progeny, if the facts of the case bring it within the scope of rule.

In *Ryan* and subsequent cases, the party against whom indemnity had been asserted, was charged with some act of negligence contributing to the injury giving rise to the claim. *Ryan* involved improper stowage of the cargo by the stevedoring contractor, resulting in injury to its employee. *General Electric* involved failure of the carrier to check the cargo, after it had been loaded by the shipper, and make it safe and secure, before sending it on its journey. An analysis of the other cases following in *Ryan's* wake, involves similar situations.

In the case sub judice the demand contained in the complaint is not bottomed on an act of negligence, or failure to perform a duty, on the part of the carriers, or either of them, but rather on alleged acts of negligence committed by the shipper, the owner of the cargo, in that the shipper failed to warn the crew members of the dangers inherent to the oil, which were known to it but unknown to the crew of the vessel.

Under the facts of the case, the Court does not feel warranted in finding that the case is within the principle of law established in *Ryan*.

It is uncontroverted that the contracts do not contain an express indemnity agreement. If liability is to be imposed on Oil Transport and/or Greenville, such must be done on the theory of breach of an implied indemnity arising out of the doctrine of implied warranty of workmanlike service. The uncontroverted facts do not show a breach of an implied indemnity by either carrier.

Since the record shows that there is no genuine issue as to any material fact, Oil Transport and Greenville are entitled to a summary judgment as a matter of law. Rule 56(c) of the Federal Rules of Civil Procedure.

An order will be entered sustaining the motions for summary judgment of Oil Transport and Greenville, denying the motion of Sohio, and dismissing the action with prejudice as to all parties.

This the 12th day of February, 1970.

/s/ Orma R. Smith
United States District Judge

APPENDIX "C"

(Reprinted from West System Reports)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24091.

W. W. HOBART, Administrator of the Estate of Kenneth Ray McClure Hobart, deceased et al., Appellants,

v.

SOHIO PETROLEUM COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

(May 15, 1967.)

Before RIVES, COLEMAN and GODBOLD, Circuit Judges:

PER CURIAM:

The plaintiffs, appellants, sue as administrators for the alleged wrongful deaths of two young men, members of the crew of a crude oil tank barge. The complaint charged that the defendant, appellee, Sohio Petroleum Company, was the shipper of a cargo of Wyoming Sour Crude Oil from a terminal at Hartford, Illinois, to its terminal at Mayersville, Mississippi, by barge owned by the decedents' employer, Greenville Towing Company. The complaint further alleged that the shipment was inherently dangerous in that it contained hydrogen sulfide gas in toxic concentration; that Sohio knew of this inherently dangerous characteristic which was unknown to the decedents and to their employer, but that Sohio gave no warning of the danger. The complaint further charged that the decedents in the performance of their duties entered the hold of one of the barges, where they died as a result of Sohio's failure to give warning.

The case was tried to the court without a jury. After a full trial, the court rendered an opinion which states the law and the facts in considerable detail, and which is reported in 255 F.Supp at 972 to 980. The court held that, while Sohio gave no warning, it was under no duty to warn because the crude oil in the shipment was no more dangerous than ordinary crude oil. It further held that the plaintiffs had failed to carry their burden of proving that lack of warning was a proximate cause of the decedents' deaths.

The principles of law are well stated in the opinion of the district court. The only substantial issues presented on this appeal are questions of fact. After a careful study of the record, we cannot set aside the findings of fact as clearly erroneous. Rule 52(a), Fed.R.Civ.P.

The judgment for the defendant Sohio on the complaint of each administrator is affirmed.

APPENDIX "D"

(Reprinted from West System Reports)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

No. GC 6337.

W. W. HOBART, Administrator of the Estate of Kenneth Ray McClure Hobart, Deceased; and H. L. Jones, Administrator of the Estate of Roy Lorenzo Jones, Deceased,
Plaintiffs,

v.

SOHIO PETROLEUM COMPANY,
Defendant and Third-Party
Plaintiff,

v.

OIL TRANSPORT COMPANY, Incorporated,
Third-Party Defendant,

and

GREENVILLE TOWING COMPANY,
Third-Party Defendant and Third-
Party Plaintiff,

v.

H. H. HOBART, Tina Mae Hobart, Guy Jones and Bessie Worthy Jones,
Third-Party Defendants.

(June 29, 1966.)

MEMORANDUM OPINION

CLAYTON, Chief Judge.

This action was brought by the Mississippi administrators of the estates of two deceased minors, Kenneth Ray McClure Hobart and Roy Lorenzo Jones, to recover damages for their alleged wrongful deaths, pursuant to Mississippi Code Annotated 1942 (Recompil.) § 1453. The defendant, Sohio Petroleum Company, is an Ohio corporation with its principal place of business in Ohio. The matter in controversy exceeds the sum or value of $10,000 and jurisdiction thus rests on the diverse citizenship of the parties. 28 U.S.C. § 1332.

The plaintiffs alleged that their decedents were crewmembers on the M/V Walter Williamson and its tow, the barges GTC-3, -4, and -5, all of which were owned and operated by Greenville Towing Company, Inc., a Texas corporation. This flotilla had taken on a cargo of Wyoming Sour Crude Oil at a river terminal at Hartford, Illinois, for shipment to Sohio's terminal at Mayersville, Mississippi, and, on the night of 6-7 September, 1961, was engaged in discharging the cargo at Mayersville. The shipment was allegedly made on Sohio's order. It was also alleged that in the course of their duties the decedents had entered the holds of the barges from time to time when carrying other cargoes, and that they had no reason to believe that this cargo was any different. However, plaintiffs alleged, Wyoming Sour Crude Oil has an unusually high hydrogen sulfide content, higher than that of any other type of domestic crude oil, and hydrogen sulfide is an extremely toxic gas capable, in high concentration, of causing death as rapidly as does hydrogen cyanide. Sohio allegedly knew or should have known of the inherently dangerous characteristics of Wyoming Sour Crude Oil but failed to give any warning thereof to the crew of the flotilla. The decedents entered the hold of one of the barges during the discharge of the cargo on 7 September, 1961, were overcome by hydrogen sulfide gas and died,

allegedly as a proximate result of Sohio's breach of a duty to warn.

Sohio answered and filed a third party complaint against Oil Transport Company, a Louisiana corporation which operates a barge line, and Greenville Towing Company. Sohio alleged that in January 1961 it had entered into a contract with Oil Transport for the shipment of crude oil from Hartford, Illinois to Mayersville, Mississippi. This contract provided that Oil Transport would load and discharge the cargo at its sole risk and expense, including the risk of injury to crewmembers and others as a result of any inherent vice in the cargo. Oil Transport, in turn, allegedly sub-contracted with Greenville Towing Company in August 1961 for one voyage of tow laden with Wyoming Sour Crude Oil, with a similar agreement by Greenville to assure all risk of injury. Sohio asserted that if it was liable to plaintiffs, such liability was solely caused by the fault of Greenville and Oil Transport and that they should bear such liability.

Greenville Towing Company answered the third party complaint, which answer included a "counterclaim and crossclaim" against the original plaintiffs. The answer in addition to denying that Greenville had been negligent, alleged that the same plaintiffs had earlier made claims directly against Greenville for the deaths here involved and that a settlement had been effected which included a complete release. The claim against the plaintiffs was based on an alleged indemnity agreement included in the release, whereby the administrators had agreed to hold Greenville harmless from any loss incurred upon its being impleaded by Sohio as a result of proceedings instituted by plaintiffs against Sohio, and to refrain from executing any judgment against Sohio to the extent that Sohio might have judgment over against Greenville. At the same time,

Greenville filed a third party complaint against the next of kin of the decedents, who had been parties to the releases, on the same theory.

The plaintiffs and next of kin separately answered Greenville's "counterclaim-crossclaim" and third party complaint, asserting that the releases were limited to Jones Act claims and did not extend to wrongful death actions, such as this one, brought under state law.

Sohio moved for summary judgment on the plaintiffs' complaint and also for summary judgment on its third party complaint against the two carriers. Oil Transport moved, in advance of answer, for summary judgment on Sohio's third party complaint, and Greenville filed a similar motion. This court overruled Sohio's motion insofar as it was directed to the plaintiffs' complaint. Believing that resolution of the controversy between the plaintiffs and Sohio might be decisive as to all issues, the court severed all issues except those between the original parties and reserved disposition on them pending determination of that original controversy. All further proceedings not encompassed in the original controversy were stayed.

A trial to the court sitting without a jury was held on the issues made by the complaint of the administrators and Sohio's answer thereto. These parties were granted leave to supplement the trial record by deposing expert witnesses after trial and plaintiffs later filed such a deposition. Counsel submitted proposed findings of fact and conclusions of law and memorandum briefs, and, following receipt of these materials, the court heard oral argument. On this basis, this cause is now before the court for disposition on the merits.

The Mississippi decisions are not inconsistent with the principles applicable in practically all other jurisdictions which impose a duty on distributors, shippers and other

suppliers of inherently dangerous substances of conveying to users and other persons who may foreseeably be exposed to the hazard a fair and adequate warning of the dangerous potentialities. See, e. g., Farmers Gin Co. v. Leach, 178 Miss. 784, 174 So. 566 (1937); 1 Shearman & Redfield Negligence (Rev.Ed.1941) § 26, p. 64; 65 C.J.S. Negligence § 100. An inherently dangerous substance is one burdened with a latent danger or dangers which derives from the very nature of the substance itself, and the duty arises only with respect to hidden or concealed dangers. Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So.2d 558 (1962); Campo v. Scofield, 301 N.Y. 468, 95 N.E. 2d 802 (1950); 65 C.J.S. Negligence § 100b (2), p. 626. Even though the danger may be hidden, the duty encompasses only dangers which are unknown, Farmers Gin Co., Inc. v. Leach, supra, and there is no duty to warn when the user has actual knowledge of the danger. Morrocco v. Northwest Engineering Co., 310 F.2d 809 (6th Cir. 1962). Knowledge of the danger is equivalent to prior notice, District of Columbia v. Moulton, 182 U.S. 576, 21 S.Ct. 840, 45 L.Ed. 1237 (1901), and a failure to warn of a fact of which the user is already fully aware is not a breach of duty. Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946). Discharge of the duty to warn may involve a constructive element, by giving the warning to the superiors in employment of the person to whom the duty is owed. Similarly, knowledge of the hazard on the part of the superiors may be reasonably assumed to have been communicated to the employees. See 1 Shearman & Redfield Negligence § 26, p. 66.

Crude oil is, for more than one reason, an inherently dangerous substance. One latent danger is the fire hazard. But, as the evidence shows without contradiction, the fire hazard is universally appreciated throughout the petroleum barge line industry, from inexperienced deck hand on

up to company president. The United States Coast Guard and the carriers themselves have promulgated numerous safety regulations warning of and protecting against this hazard. Consequently a shipper would not have a duty to warn of the fire hazard in a shipment of crude oil.

A second hazard concealed in all crude oils, sweet or sour, is one which, for simplicity, although perhaps inaccurately, will be identified here as the suffocation hazard. It is generally known and understood in the industry that all crude oils evolve hydrocarbon gases at atmospheric pressure and ambient temperature. The rate and amount of discharge of the gases varies under different conditions including amount of agitation, temperature variations and other factors. When the oil is confined, as in a storage tank or barge compartment, the gases to some extent will supplant the normal atmosphere in any free space inside the container. Because of their weight the heavier concentrations of hydrocarbon gases will be at the lower levels. To the extent that the hydrocarbon gases replace and drive out the oxygen in the normal atmosphere, the life sustaining capacity of the remaining atmosphere is reduced or eliminated, and an occupant of the compartment would suffer the effects of suffocation.

Whether or not any of the hydrocarbon gases are toxic, i.e., capable in sufficient concentration of producing, by chemical action, a deleterious organic effect on the human system, they create a serious hazard within such compartments. Thus there is a well known safety practice in the industry, supported by Coast Guard regulations, which forbids entry into a compartment which has contained crude oil unless it has since been "gas freed" by qualified persons and certified safe by a qualified chemist. In emergency situations, licensed tankermen may enter such compartments before they have been gas freed, but only if a fresh

air mask and hose is utilized, a line is secured to the body and at least one strong person is standing by to assist at the first sign of difficulty.

The suffocation hazard and the corresponding safety rules are well known in the industry. There may be instances where the rules have been violated without injury, but these instances may be ascribed to the varying amounts of gases evolved from different crude oils under particular conditions and the variations in each individual's demand for oxygen because of his physical characteristics and the level of exertion. Nevertheless, the evidence establishes that the rules are generally known in the industry and that the personnel of Greenville Towing Company had this understanding and followed this practice when dealing with crude oils.

The evidence also establishes by a substantial preponderance that, insofar as any latent hazards are concerned, the industry does not regard or treat sour crude oil any differently from sweet crude oil and that "sour crude oil," "Wyoming Sour Crude Oil" and related terms have no special significance in the industry in this sense.

The plaintiffs do not contend that Sohio had any duty to give warning of the inherent fire and suffocation hazards. Rather, their theory is that in addition to these inherent dangers sour crude oil, unlike sweet crude oil, contains and evolves hydrogen sulfide gas, which is toxic and, in sufficient concentrations, lethal. Wyoming Sour Crude Oil they say, is the most dangerous since it contains and produces a greater amount of hydrogen sulfide than any other domestic sour crude oil. It is the plaintiffs' position that this additional latent danger was not known to the decedents or their employer; that Sohio provided no warning; and that as a proximate result of Sohio's failure to

warn the decedents, they entered the hold of the barge and met their deaths from inspiring hydrogen sulfide gas.

In answer to interrogatories propounded by the plaintiffs, Sohio stated that it had given notice to Oil Transport of the dangers inherent in Wyoming Sour Crude Oil. However, Sohio's oil movement coordinator, by whom the warning was allegedly given, and the president of Oil Transport, the alleged recipient both testified that no such warning was given or received. The evidence is conclusive that no warning of any kind as to any inherent hazards peculiar to sour crude oils or Wyoming Sour Crude Oil was given by anyone to the decedents, to Greenville Towing Company or to Oil Transport.

Since no warning was given, the remaining issues are whether an inherent danger of the character alleged actually existed in the particular cargo, unknown to the decedents or their employer, so as to require Sohio to give warning, and whether the failure to given warning was a proximate cause of the deaths.

In 1960 Sohio decided to purchase a quantity of sour crude oil from the Marathon Oil Company for the manufacturing of asphalt. The oil was produced in Wyoming by Marathon and transferred through a pipeline to Hartford, Illinois. Sohio determined that the best means of delivering the oil to its refinery in Kentucky was to barge it down the Mississippi River from Hartford to the Sohio terminal at Mayersville, Mississippi, at which point it would be introduced into a second pipeline connecting Mayersville and the Kentucky refinery. Oil Transport entered into a contract with Sohio to provide the river carriage during a nine month period in 1961. Scheduling demands and other factors occasionally made it necessary for Oil Transport to sub-contract portions of the carriage. One of the four

sub-contractors was Greenville Towing Company which, through the medium of a barge transportation broker, undertook to make one voyage in September 1961. It was this voyage that culminated in the tragedy upon which this action is based.

A Greenville flotilla consisting of the M/V Walter Williamson and the barges GTC-3, -4, and -5, with plaintiffs' decedents as members of the crew, loaded approximately 44,000 barrels of cargo, identified in the sub-contract as "Wyoming Sour Crude Oil," at Hartford on 4 September, 1961. At 5:45, p. m., 6 September, the flotilla docked at Sohio's Mayersville terminal and began discharging the cargo.

The oil barges were 240 feet long with a beam of 50 feet and a depth of approximately 11 feet. The hold was divided into 10 cargo compartments which were 25 feet square and 10½ feet deep. Each compartment had an access hatch 18 to 24 inches in diameter, covered by a dome approximately three feet high, and under which stood a vertical metal ladder. Discharging was accomplished through a suction valve in each compartment to which a pump was connected. Some difficulty was experienced on this night with the valve in the number two starboard compartment of GTC-4 so that discharge was ended when approximately eighteen inches of oil remained in the bottom. The mate who decided to postpone investigation of the trouble until the morning apparently did not make this known to other members of the crew. Hobart came on watch at a later time, midnight, and observed that the number two starboard compartment was not unloading properly.

At approximately 12:30, a.m., on 7 June, the general manager of the company (who had temporarily assumed command) encountered Hobart at the number two star-

board hatch. Hobart expressed his concern about the valve. The general manager looked into the compartment, told Hobart to not worry about it, and walked up to the number one hatch, fifty feet away. A few moments later the general manager returned to the number two hatch and found Hobart inside the compartment, near the top of the ladder, shining his flashlight around. The general manager told Hobart to come out and again walked away. He returned in two or three minutes to find Hobart halfway down the ladder. This time the general manager shouted, "I told you to come out of that tank and leave it alone." Hobart, conscious and comprehending, started up but then collapsed on the bottom near the base of the ladder, face down.

The general manager shouted for help and ran to the bow of the next barge, picked up a heavy line, and dragged it back to the hatch. He climbed down, trying to hold his breath, and attempted to attach the line to Hobart with one hand while hanging onto the ladder with the other. He began to feel dizzy and tried to climb out but he was unable to climb beyond the point where the hatchway dome rises above the deck. The company steward, who had heard the call for help, arrived in time to catch the general manager as he lost consciousness, but the steward was unable to lift him out. (The general manager was in his late forties and weighed over 210 pounds.) Other crewmen arrived some minutes later and pulled the general manager out. He had spent two or three minutes down in the compartment, in addition to the time which he was hanging onto the top of the ladder. The general manager was given mouth-to-mouth resuscitation for 12 to 15 minutes before he regained consciousness, feeling groggy and nauseated. Upon recovering he gave orders to operate the vents and turn on the blowers so as to put fresh air into the compartment.

Meanwhile, Jones and the off-watch crewmembers had arrived on the scene. While the others were preoccupied with the unconscious general manager, Jones went into the compartment in an attempt to rescue Hobart. After about five minutes Jones lost consciousness without having succeeded in his attempt at rescue. At this point the mate, a licensed tankerman, rigged an airline mask and went into the compartment but the airhose fouled and either made the mask ineffective or pulled it loose. Beginning to be affected by the fumes, he climbed out, leaving Jones and Hobart in the compartment.

After Jones had been in the compartment fifteen or twenty minutes, a pike pole was hooked through his belt and he was pulled out. Mouth-to-mouth resuscitation was administered for over forty-five minutes without success. Hobart's body was removed later with the aid of a looped line dropped over his foot.

Both the general manager and the mate had become nauseated and had vomited after their experiences in the hold, and some of the other crewmembers were similarly affected. The steward who administered mouth-to-mouth resuscitation to the general manager became ill; another man who had similarly attempted to revive Jones was not affected. About an hour later a local physician arrived and pronounced Hobart and Jones dead. Some ten days later he certified the cause of death in each case as "suffocation due to crude petroleum gas." At the trial, however, he said "they died from poison, from inhaling the gas fumes down in this [hold] that they were in."

This witness said these gas fumes "smelled like hydrogen sulfide," and although he admitted that this was the first time he had ever smelled such an odor, he indicated that it was like that of rotten eggs. The doctor agreed that the gases in the hold would have removed the oxygen so

that a person inside would suffocate, but he did not agree that this was the sole cause of these deaths. While his testimony is not clear on this point, it appears that the doctor was of the opinion that, in addition to the effects of suffocation, the causes of death included the action of a poisonous gas. This conclusion apparently was reached solely on the basis of the rotten egg odor, the circumstances described to him and the illness of some of the other men. No tests were conducted to determine the gas content of the compartment and no autopsies were performed.

Hydrogen sulfide is a colorless, inflammable gas having an offensive odor like that of rotten eggs. However, odor is not reliable as a warning of its presence in dangerous concentrations and the evidence directed toward the odors perceived at the death scene is equivocal and valueless in resolving the issues here. First, the expert testimony and documentary evidence demonstrated that this gas has a rapidly paralyzant effect on the olfactory nerve. So long as its odor can be detected, hydrogen sulfide is not present in sufficient concentration to cause any lasting ill effects; when the concentration increases to the dangerous levels the resulting paralysis of the olfactory nerve precludes detection through the sense of smell. Second, all crude oils contain various aromatic constituents which produce strong odors, and while the expert testimony is conflicting on this point, it appears probable that some of the hydrocarbon gases have offensive odors. Accurate distinction of these odors from the odor of hydrogen sulfide would be difficult. Third, there is the obvious difficulty of learning from witnesses the exact nature of an odor, when each of them may perceive it with at least some slight difference and may resort to different and sometimes conflicting analogies in attempting to describe it.

In high concentration hydrogen sulfide has a systemic effect and in acute poisoning death is as rapid as in poisoning by cyanide. The increasing number of sour crude oil fields in the twenty years preceding World War II brought about a corresponding increase in the reports of injury and death in those fields as a result of hydrogen sulfide poisoning. Two of plaintiffs' exhibits, information circulars published in 1945 by the Bureau of Mines of the Department of the Interior, are examples of the governmental efforts to warn against the hazard. It is worthy of note that most of the casualties described in these documents seem to have occurred in the oil fields rather than at some remote location. The age of the documents, especially in connection with an industry which exerts so much effort in research and development, suggests that their conclusions should be scrutinized with care at this time.

The term "sour crude" is non-technical and its definition is largely relative. To some witnesses it meant an oil which would have a corrosive effect on barges and pipelines. To others it meant a crude oil having a higher than normal sulfur content. Plaintiffs contend that a sour crude oil necessarily contains hydrogen sulfide and that Wyoming Sour Crude Oil, by definition, is one which has an unusually high hydrogen sulfide content. No reconciliation of these definitions is necessary here, since, for present purposes, they are not in material conflict. It is enough to find, as the court does, that sour crude oils have a higher than normal sulfur content and that most of these oils contain hydrogen sulfide.

"Wyoming Sour Crude Oil" is a name of convenience informally developed and then adopted as a trade label by the Marathon Oil Company. A number of other names such as "Ohio Special Asphalt Crude" and "Marathon Special Asphalt Crude" are equally applicable to the same

product. Marathon produces crude oil from ten or more oil fields in Wyoming which contain thirty-one oil sands. Only three of these thirty-one sands show a gas analysis containing hydrogen sulfide; a trace in one, .15% in a second and approximately .18% in the third. The third sand containing oil with the heaviest concentration of hydrogen sulfide is one of four sands in the Elk Basin field.

The crude oil in the ground is under high pressure. When it reaches atmospheric pressure and ambient temperature at the well head, most of the gases present, including hydrogen sulfide, are spontaneously released. Through several processes carried out in the production field most of the remaining gases still entrained in the oil are removed for commercial purposes and as a safety measure. In the Elk Basin field, where the highest concentration of the gas is found, as much hydrogen sulfide as possible is removed for conversion into sulfur. Marathon then blends the crude oils from its ten or more fields into a special asphalt stream and pumps it through a pipeline from Western Wyoming to storage tanks at Hartford, Illinois. In 1961, as previously, sour crude oil from the Elk Basin field constituted only a small percentage of this blended stream.

As a result of the steps just described, the amount of hydrogen sulfide entrained in the blended crude oil which is capable of evolving at normal pressures and temperatures would necessarily be greatly reduced, if not eliminated, by the time the oil arrives at Hartford. Tests conducted by both Sohio and Marathon in late 1959 confirmed this fact. Crude oil is volatile and continues to give off hydrocarbon gases at ambient temperature and atmospheric pressure. Hydrogen sulfide, once exhausted, does not continue to evolve under such conditions. After this exhaustion occurs the gas can be separated only in the refining process by application of extreme heat, 650-750 degrees Fahrenheit.

The laboratory analyses conducted by Sohio and Marathon in 1959 revealed no free or dissolved hydrogen sulfide in the crude blend at atmospheric pressure and ambient temperature. Further, Sohio analyzed each order of sour crude oil received at the Kentucky refinery to insure that the crude being received was the same as that purchased. Other more extensive tests were made from time to time and all of these tests consistently indicated the absence of any free or dissolved hydrogen sulfide at atmospheric pressures and ambient temperatures.

In the face of this evidence, which is substantially corroborated and not credibly contradicted, it must be found that the blended sour crude oil purchased by Sohio from Marathon and shipped via the Mississippi River from Hartford to Mayersville in 1961 did not contain a latent danger, as a result of the presence of hydrogen sulfide in the oil, which can be distinguished from and elevated above the latent danger identified here as the suffocation hazard or the latent danger caused by the presence of any other gases, toxic or non-toxic. No other, greater and special precautions would be required in the barge line industry to protect against injury from hydrogen sulfide gas, if any at all would be necessary, than would be required to protect against other known dangers. The carriers and their employees could not be reasonably expected to conduct themselves any differently in handling crude oils in absence of such a warning. Sohio therefore had no duty to warn plaintiffs' decedents in the circumstances established here.

Even if such a warning were required, plaintiffs have not carried their burden of proving that the failure to warn was the proximate cause of the deaths. The evidence, rather than showing by a preponderance thereof that hydrogen sulfide poisoning was the efficient cause of the deaths, establishes to the satisfaction of the court that

Hobart and Jones succumbed to a known danger, suffocation caused by the saturation of the atmosphere in the compartment with hydrocarbon gases which drove out the necessary supply of oxygen. The latter cause is certainly more probable and it is not inconsistent with the circumstances surrounding the tragedy, including the lengths of the periods of exposure of the four men who entered the compartment, the varying degrees to which they were affected, the exertion and emotional involvement (and possibly some element of panic) which increased each individual's demand for oxygen and thus aggravated the effect of the suffocating gases, and the illness experienced by the other crewmembers. (The last factor, as defendant's expert witnesses testified, can be accounted for without finding that they had inhaled a poisonous gas. Various physical and psychological stimuli, including the non-toxic hydrocarbon gases, the unpleasant odors, the sudden deaths of two shipmates, natural revulsion by those who gave mouth-to-mouth resuscitation coupled with the intake of gas-fouled air from the victim's lungs, and possibly the belief, whether rightly or wrongfully held, that there was a toxic gas free in the area, might have contributed to the nausea experienced by these men.) In sum, the evidence is most persuasive that Hobart and Jones were suffocated by the non-toxic hydrocarbon gases which deprived them of oxygen.

At the same time, there is overwhelming evidence that no lethal concentrations of hydrogen sulfide were present in this barge compartment at this time. As described above, Sohio analyzed each shipment of oil as it reached the refinery in Kentucky. This cargo of crude oil was received at the refinery on 15 September, 1961, with nothing lost from the oil in vapors during its passage through the pipeline. The analysis of this particular ship-

ment of crude oil, as in the other tests noted earlier, showed no hydrogen sulfide at temperatures ranging from 70 to 90 degrees Fahrenheit. The temperature of the oil in GTC-4 on the night of 6-7 September was in the mid-eighties, and under all of the circumstances then existing it is most improbable that any detectable, much less lethal, concentrations of the gas could have been found in the compartment in which the deaths occurred.

The defendant, Sohio Petroleum Company, is therefore entitled to judgment on the complaint of the plaintiffs. However, further proceedings in this court on the controversies which were heretofore severed and stayed, in advance of an appeal by the plaintiffs, might well prove to be valueless and unnecessarily wasteful in the event that the judgment for Sohio should be vacated or reversed by an appellate court. The special circumstances here amply justify resort to Rule 54(b), Federal Rules of Civil Procedure, and inasmuch as it appears to the satisfaction of the court that there is no just reason for delaying entry of final judgment as to the present controversy between the plaintiffs and Sohio Petroleum Company, the clerk will be directed to enter a final judgment as to that controversy. The severance and stay order as to the other claims will remain effective until further order of this court.

An order will be entered in accordance with the foregoing.

APPENDIX "E"

(Reprinted from West System Reports)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7878.

GENERAL ELECTRIC COMPANY,
Defendant and Third-Party
Plaintiff, Appellant,

v.

Kelly C. MORETZ, Plaintiff,

and

Mason & Dixon Lines, Inc., Third-Party
Defendant, Appellees.

Appeal from the United States District Court
for the Western District of Virginia

(Sept. 16, 1959.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and THOMSEN, District Judge.

SOPER, Circuit Judge.

This suit was brought by Kelly C. Moretz against the General Electric Company for injuries suffered by him while driving a trailer truck in which heavy crated electric control panels and other electrical equipment belonging to General Electric had been negligently loaded. Moretz was an employee of The Mason & Dixon Lines, Inc., a common carrier, which owned the vehicle and undertook the transportation of the shipment. In the first instance, the

cargo was placed in the trailer by employees of General Electric at its plant in Salem, Roanoke County, Virginia. It was loaded in such a fashion that an open space was left in the center of the trailer without bracing, allowing the cargo to shift in the course of the subsequent journey. In this condition the trailer was turned over to a pickup driver of Mason & Dixon, who delivered it without mishap to the Mason & Dixon terminal eight or nine miles away at Roanoke, Virginia. There the trailer was sealed and turned over to the plaintiff, an over-the-road driver of Mason & Dixon, to be driven to its ultimate destination in Alabama. No change was made in the disposition of the cargo, although Mason & Dixon had notice that it was improperly stowed. During the subsequent trip the load suddenly shifted as the vehicle rounded a turn in the road near Roanoke, causing the trailer to overturn and injure the driver; and this suit was brought to recover for his injuries.

After the institution of the suit, General Electric filed an answer in which it denied that it had been guilty of any negligence which caused the accident. With the leave of the court it also filed a third-party complaint against The Mason & Dixon Lines, wherein it alleged that the carrier had the duty to inspect the shipment and to decline it if it was improperly loaded and that its failure to perform these duties was the proximate cause of the accident; and that even if General Electric was guilty of negligence in loading the trailer improperly in the first place, it was entitled to indemnity from the carrier for any damages recovered by the plaintiff since the fault of Mason & Dixon in transporting the goods, with notice of faulty stowage, was so grave as to throw the whole loss upon it.

In response to the third-party action, Mason & Dixon filed an answer, which in effect denied liability, and also

moved the court for a separate trial of the issues raised by the plaintiff. In addition, Mason & Dixon moved the court to dismiss the third-party complaint on the ground that the plaintiff in the original suit had been paid compensation for his injuries under the Workmen's Compensation Act of Tennessee as an employee of Mason & Dixon and that under § 50-908 of the Tennessee Code the plaintiff's right to compensation was exclusive of all other rights and remedies against his employer. The court, however, declined to pass upon the motion to dismiss at that time and the case of the plaintiff against General Electric proceeded to trial before the jury in which all parties participated. Prior to the trial the judge announced that the case would be first submitted to the jury on the question of the primary negligence of General Electric and its liability to the plaintiff and that any action thereafter upon the third-party complaint would take the form of a special interrogatory to the jury in order to enable the court to determine the liability of the carrier to indemnify the shipper. Accordingly, the jury were instructed that their verdict must be confined to the issue of the liability of General Electric to the plaintiff and that Mason & Dixon was in the case because of the contention that it was liable to General Electric, but that the jury should not bring in any verdict in favor of the plaintiff against Mason & Dixon. The jury returned a verdict in favor of the plaintiff against General Electric in the sum of $35,000 and thereupon the District Court submitted a special interrogatory to the jury as to whether Mason & Dixon was guilty of negligence which proximately contributed to the accident and the resulting injuries to the plaintiff. The jury answered this interrogatory in the affirmative. The uncontradicted evidence in the case showed that Mason & Dixon transported the goods with knowledge that they were insecurely loaded.

Prior to the trial the Liberty Mutual Insurance Company filed a petition setting forth that it had insured Mason & Dixon against liability under the Workmen's Compensation Act of Tennessee and had paid certain benefits on behalf of the carrier to the plaintiff and it therefore claimed subrogation to the right of the carrier to recover the benefits that it had paid under the Act. After the jury retired to consider the verdict the Insurance Company proved that it had paid, under the statute, the amount of $1665.99 to the plaintiff and in the final judgment of the court it was ordered that the General Electric Company pay this sum to the Insurance Company out of the amount awarded to the plaintiff by the jury's verdict, less ten per cent which was ordered to be paid to plaintiff's attorneys for services rendered.

We consider first the contention of General Electric, that a motion for a directed verdict in its favor should have been granted because under the undisputed facts of the case the injuries were not caused by the negligence of General Electric but by the intervening independent negligence of Mason & Dixon and, second, because the plaintiff himself was guilty of contributory negligence. In respect to the first defense, reliance is placed upon the rule in Virginia, where the accident occurred, that if a second tort-feasor is aware or should be aware of a potential danger created by the negligence of an original tort-feasor and thereafter, by an independent act of negligence brings about an accident, the dangerous condition created by the first actor is regarded merely as an incident which is insulated by the independent wrongful act of the second actor, and the latter's negligence is regarded as the sole proximate cause of the accident. Thus, in Hubbard v. Murray, 173 Va. 448, 3 S.E.2d 397, a bus which had been carelessly parked on the highway in violation of the statute

was struck in the rear, in broad daylight, by a carelessly driven truck which then careened across the road and killed an occupant of an oncoming car, and it was held that the driver of the truck was liable for the accident. See also Edgerton v. Norfolk Southern Bus Corp., 187 Va. 642, 47 S.E.2d 409.

The District Judge correctly held that this rule is not applicable in the pending case because there was no independent act of negligence but merely passive inaction on the part of Mason & Dixon in failing to correct the dangerous condition which General Electric had created. The general rule in such a situation is set forth in the Restatement of Torts as follows:

> "§ 452. Failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the other's harm.
>
> "Comment:
>
> "a. * * * The third person's failure to perform his duty in this respect makes him concurrently liable with the negligent actor for any harm which results from the actor's negligence and which would have been prevented by the performance of the third person's duty."[1]

We had occasion to consider a similar question in Pierce v. Ford Motor Co., 4 Cir., 190 F.2d 910, where the negligence of the manufacturer in delivering a defective car to a dealer in Virginia led to an accident and the defense was that the car had been subsequently inspected by an employee of the dealer. In overruling the defense we said (190 F.2d at page 913):

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1. The Virginia authorities are in accord with this rule. Clinchfield Coal Corp. v. Ray, 1917, 121 Va. 318, 93 S.E. 601; Chesapeake & O. R. Co. v. Crum, 1924, 140 Va. 333, 125 S.E. 301; Scott v. Simms, 1949, 188 Va. 808, 51 S.E.2d 250.

"It is argued that any negligence of the manufacturer in turning out a defective car is insulated by that of a mechanic who inspects it afterwards so that the latter will be deemed the proximate cause of any injury resulting from its defective condition; but this argument is entirely without merit. As said in Harper on Torts, ch. 7, sec. 106, quoted in Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517, 529: 'A negligent defendant cannot escape liability because of a failure on the part of some third person to perform an affirmative duty which, if properly performed, would have enabled the plaintiff to avoid the risk created by the defendant's negligence. The failure of the other to inspect adequately may make him liable to the party harmed, but it will not relieve the defendant whose negligence was responsible for the hazard in the first place.'

"As we pointed out in Atlantic Greyhound Corp. v. McDonald, 4 Cir., 125 F.2d 849, 852: 'It is well settled under the law of Virginia that "a cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's negligence contributing in the slightest degree thereto, in fact produced the injury." ' "[2]

In the next place, General Electric contends that the plaintiff was guilty of contributory negligence because he did not inspect the fastening of the load and make sure that it was securely in place before he started on his drive to Alabama. The Interstate Commerce Commission, acting under the authority of 49 U.S.C.A. § 304, has promulgated certain rules and regulations regarding the transportation

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2. For the reasons given above, the judge correctly refused a charge requested by General Electric in the pending case that even if it was guilty of prior neglect the verdict should be in its favor if the jury found that Mason & Dixon saw or should have seen the defect and danger and had an opportunity to correct it but failed to do so.

of property by motor carrier. These regulations provide amongst other things that "no motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place," 49 C.F.R. 193.9(b). The gist of the contention is that the plaintiff did not make the inspection required by these regulations before starting out on the trip. He had nothing to do originally with the loading of the vehicle at the General Electric plant or with the inspection of it after it was delivered by the pickup driver to the terminal of the carrier at Roanoke. The latter driver reported to the officials in charge at the terminal that the load had not been braced, but no change in its disposition was made. Before the vehicle was turned over to the plaintiff to be driven to its ultimate destination, the doors were sealed and it was covered by tarpaulin secured to the sides of the vehicle, so that he could not see or inspect the load before he started out without breaking the seal; and he had no authority to do this under the rules of his employer. He did, however, inspect the tires, the lights, and the fastenings of the trailer to see if they were secure, and checked to see if the doors were properly fastened, and found all of these items in good shape.

No specific instructions to the jury on this point were requested by the defendant, but the contention is that the request for a directed verdict should have been granted because the driver did not satisfy himself that the load was securely fastened as required by the regulations. In our opinion, under the circumstances related, the motion for a directed verdict on this point was properly refused. Undoubtedly it was the duty of the driver to make the required inspection and had he failed to do so he might well have been charged with contributory negligence for violation of a regulation designed for the protection of the

public; but we cannot say that it was his duty to disobey the rules of his employer and break the seal which had been placed on the doors of the truck before it was put in his charge. There was evidence from which the jury might find that it was not unreasonable on his part to infer from the sealing of the doors of the truck that the load had been properly secured by the agents of the carrier and thus satisfy himself that the cargo was ready for carriage over the public highway. In this connection, the judge charged the jury that the evidence showed that the plaintiff had no knowledge of the manner in which the cargo was loaded as the trailer had been sealed before it was turned over to him, and that the knowledge of the other employees of the carrier of the manner in which the cargo was loaded was not to be imputed to him since he himself had no knowledge of the manner in which it had been stowed. At the conclusion of the charge the attorneys for both sides, in response to an inquiry of the court, stated that they had no objections to urge.

We conclude that there was substantial evidence to support the verdict against General Electric and we come to its alternate contention that even if its careless loading of the cargo contributed to the accident, it is nevertheless entitled to indemnity from Mason & Dixon, the carrier, because of the latter's failure to secure the load safely before sending it on the road. This neglect on the carrier's part was clearly established by the uncontradicted evidence and by the answer of the jury to the special interrogatory submitted to them after they had found their verdict in favor of the plaintiff against General Electric. The question of indemnity came before the court on the motion of General Electric to set aside the verdict and enter judgment in its favor or, in the alternative, to enter judgment in its favor against Mason & Dixon for the

amount of the verdict on the ground that Mason & Dixon as the carrier of the goods was the principal offender.

The judge overruled this motion. He was of the opinion that General Electric was not entitled to the right of indemnity against Mason & Dixon unless it could be found in the contractual relationship between them, and he held that the contract gave General Electric no such right. The bill of lading covering the shipment was issued under a published tariff of Southern Motors Carriers, filed with the Interstate Commerce Commission and the Virginia Corporation Commission which provided in Rule 21 that an article weighing 500-pounds or more or exceeding 8-feet in its greatest dimension and 4-feet in each intermediate dimension should be loaded by the shipper.[3]

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3. "Rule 21. *Heavy or Bulky Articles, Loading or Unloading.* Sec. 1. Where an article (or articles) in a single container or shipping form tendered, weighs 500 lbs. or more, or if the greatest dimension exceeds 8 feet or greater and intermediate dimension each exceeds 4 feet, loading or unloading shall be performed by the shipper or consignee, as the case may be. If requested, carriers will undertake, in behalf of the shipper or consignee, as the case may be, to employ additional help. No charge will be made for labor performed by the truck driver, but a charge of one dollar and fifty cents ($1.50) per hour or fraction thereof, for each man furnished, other than the truck driver, shall apply from time vehicle arrives at the place of pickup or delivery until shipment is loaded or unloaded, as the case may be.

"Exception—The provisions of Sec. 1 will not apply if such article (or articles), weighing less than 500 pounds:

"(a) exceeds 8 feet but does not exceed 22 feet in its greatest dimension and does not exceed 2 feet in any other dimension, or

"(b) if it does not exceed 10 feet in its greatest dimension and does not exceed 5 feet in its intermediate dimension and does not exceed 1 foot in its least dimension.

"Rule 22. *Dunnage or Temporary Blocking, Racks, Standards, Supports, etc.* Any temporary blocking, flooring or lining racks, standards, strips, stakes, or similar bracing, dunnage or supports not constituting a part of the vehicle when required to protect and

Since General Electric, in obedience to Rule 21, undertook the performance of this duty but performed it so carelessly that the driver was injured, the judge held that it could not now demand indemnity from the carrier. These provisions of the tariff relating to the shipper, however, tell only a part of the story. Regulations issued by the Interstate Commerce Commission, under the authority of 49 U.S.C.A. § 304, impose specific duties upon the carrier of the cargo. They provide that no motor carrier shall permit any motor vehicle to be driven if the load thereon is so improperly distributed or so inadequately secured as to prevent its safe operation; and that the load shall be properly distributed, and if necessary secured, in order to prevent unsafe shifting of the load or unsafe operation of the vehicle. See 49 C.F.R. 192.9(a), (b) and 193.9(a), (b).[4] These regulations were not overlooked in the de-

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make shipments subject to other than LTL or AQ ratings or rates secured for transportation must be furnished and installed by the shipper, except that such materials as may be furnished by the shipper will be installed by the carrier at a charge for labor necessary for such installation at the rate of one dollar and fifty cents ($1.50) per hour or fraction thereof, for each man. When materials are furnished by the carrier, charge therefor will be as per tariffs lawfully on file with the Interstate Commerce Commission or State regulatory body having jurisdiction."

4. 49 C.F.R. 192.9 "(a) *Distribution and securing of load.* No motor vehicle shall be driven nor shall any motor carrier permit or require any motor vehicle to be driven if it is so loaded, or if the load thereon is so improperly distributed or so inadequately secured, as to prevent its safe operation.

"(b) *Doors, tarpaulins, tailgates, and other equipment.* No motor vehicle shall be driven unless the tailgate, tailboard, tarpaulins, doors, all equipment and rigging used in the operation of said vehicle, and all means of fastening the load, are securely in place."

49 C.F.R. 193.9 "(a) *Distribution and securing of load.* The load on every motor vehicle transporting property shall be prop-

cision below but it was thought that they merely imposed a duty upon the carrier to protect the general public and did not form a part of the contract between the shipper and the carrier; and since the plaintiff was not a member of the general public—but an employee of Mason & Dixon—his rights as to his employer were fixed by the Workmen's Compensation Act of Tennessee.

In addition to these regulatory provisions, obligations were imposed upon the carrier by 49 U.S.C.A. § 20(11), which is made applicable to motor carriers by 49 U.S.C.A. § 319. This provides that any common carrier receiving property for interstate transportation shall issue a bill of lading therefor and shall be liable to the holder for any loss, damage or injury to the property caused by it and that no contract shall exempt the carrier from the liability imposed.

In our opinion the provisions of the statutes and regulations referred to as well as the provisions of the tariff formed part of the contract between the shipper and the carrier in this case. In Virginia, where the contract was made, and generally in other jurisdictions throughout the country, it is settled that relevant statutes and regulations existing at the time a contract is made become a part of it and must be read into it just as if they were expressly referred to or incorporated in its terms.[5] Hence it is plain

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erly distributed, and if necessary, secured, in order to prevent unsafe shifting of the load or unsafe operation of the vehicle.

"(b) *Fastenings secure.* No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate tarpaulins, spare tires, and all means of fastening the load are securely in place."

5. As to the inclusion of public tariffs and classifications in the contract between shipper and carrier, see Louisville & N. R. Co. v. Chatters, 1929, 279 U.S. 320, 331, 49 S.Ct. 329, 73 L.Ed. 711, 719; Eastern Motor Express, Inc. v. A. Maschmeijer, Jr., Inc., 2 Cir.,

that Mason & Dixon assume the direct and specific obligation to General Electric to secure the cargo safely so that it would not shift during the movement, and became liable for any loss caused by its failure to carry out its promises, unless it is excused by the concurring negligence of General Electric. It should be borne in mind, in this connection, that the transportation of the goods during which the loss occurred lay entirely in the hands of the carrier and that the initial failure of the shipper to load the goods properly in no way prevented the carrier from carrying out its own statutory contractual duties. Moreover, the requirement of the tariff that the shipper bear the burden of loading heavy or bulky goods was obviously inserted as part of the consideration moving from the shipper for the carriage of the goods at the published rate. It was not intended to shift to the shipper a duty ordinarily imposed upon the carrier. This becomes the more clear from the provision of the tariff that the carrier itself might do the work upon payment by the shipper of the expense involved. Clearly the carrier was not excused from carrying out its primary obligation to the shipper to make certain that the cargo delivered to it unharmed was not sent out over the public roads in a dangerous condition.

1957, 247 F.2d 826, 828, 65 A.L.R.2d 765; Fawley Motor Lines, Inc. v. Cavalier Poultry Corp., 4 Cir., 1956, 235 F.2d 416, 419; Loveless Mfg. Co. v. Roadway Exp., D.C. Okl. 1952, 104 F.Supp. 809, 812.

As to the inclusion in the contract of regulations of the Interstate Commerce Commission, see Atchison, T. & S. F. Ry. Co. v. Scarlett, 1937, 300 U.S. 471, 474, 57 S.Ct. 541, 81 L.Ed. 748.

As to the general rule in Virginia and in the Federal courts, see Maxey v. American Cas. Co. of Reading, Pa., 1942, 180 Va. 285, 290, 23 S.E.2d 221; Merchants' Bank of Danville v. Ballou, 1899, 98 Va. 112, 119, 32 S.E. 481, 44 L.R.A. 306; Union Central Life Ins. Co. v. Pollard, 1896, 94 Va. 146, 153, 26 S.E. 421; Northern Pacific R. Co. v. Wall, 1916, 241 U.S. 87, 91-92, 36 S.Ct. 493, 60 L.Ed. 905; East Texas Motor Freight Lines v. United States, 5 Cir., 239 F.2d 417, 418; 12 Am.Jur., Contracts, § 240, p. 769.

Bearing these circumstances in mind, the claim of the shipper to be indemnified for the loss caused by the carrier's default takes on a different aspect. The Federal courts on a number of occasions have given consideration to a similar question in the analogous situation of a shipowner who has been called upon to pay damages to a longshoreman for injuries received in the negligent performance by the stevedoring company, his employer, of its contract for the loading or unloading of the vessel. Liability of the stevedoring company to the longshoreman was limited to compensation under the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901 et seq. while liability of the shipowner was based on the unseaworthy condition of the ship or some act of negligence on the part of the shipowner in furnishing unsafe equipment or a safe place to work. In these cases the question has arisen as to whether the default of the shipowner deprived him of the right to be indemnified by the stevedoring company because of its failure to comply with its contract. Thus, in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, a stevedoring company was under contract with a shipowner to perform all the stevedoring operations required by the shipowner in its coastwise service; and the shipowner was held liable to a longshoreman for injuries suffered by him while unloading the ship at Brooklyn, New York, which were caused by the unsafe stowage of the cargo at an earlier port by the stevedoring contractor under the supervision of the officers of the ship who had authority to reject unsafe stowage; but it was held that the shipowner, notwithstanding its participation in the unsafe stowage, was entitled to indemnity from the stevedoring contractor. This conclusion was reached although there was no express agreement of indemnity. The Court said (350 U.S. at pages 133, 134, 76 S.Ct. at page 237):

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.

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"Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's uncorrected failure to stow the rolls 'in a reasonably safe manner.' Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

This holding was approved and followed in Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S.

563, 78 S.Ct. 438, 2 L.Ed.2d 491, where a longshoreman recovered damages from the shipowner for injuries caused by the fall of timber from an insecure structure on the deck of the ship, and it was held that the careless maintenance of the structure on the part of the ship did not preclude the submission to the jury of its claim to indemnity from the stevedoring contractor based on the latter's careless use of the structure in the unloading operation. It was pointed out (355 U.S. at page 568, 78 S.Ct. at page 441) that the duties owing by the shipowner to the longshoreman were not identical with those owed by the shipowner to the stevedoring contractor. Again, in Crumady v. The Joachim Hendrik Fisser, 1959, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413, indemnity was allowed a shipowner against a stevedoring contractor where injuries were caused by unsafe equipment furnished by the ship and used by the contractor. We applied the same rule in our decisions in Calmar Steamship Corp. v. Nacirema Operating Co., 4 Cir., 1959, 266 F.2d 79, and in American Export Lines, Inc. v. Revel, 4 Cir., 1959, 266 F.2d 82, in both of which it was held that a shipowner was liable to an injured longshoreman for injuries suffered in the use of unseaworthy equipment furnished by the ship, but that the shipowner was nevertheless entitled to indemnity from the stevedoring contractor because the latter negligently used the equipment in the performance of its contract.[6] It is plain that the default

6. Prior to the development of the theory in these cases that an agreement to indemnify is of the essence of a contract in which one undertakes to perform services for another, it had been held in this and other courts that when one who is secondarily liable is called in to respond in damages to an injured party he may recover the amount paid from the person primarily liable. See our decision in United States v. Savage Truck Line, Inc., 4 Cir., 1953, 209 F.2d 442, 44 A.L.R.2d 984 where, under circumstances very similar to those in the case at bar we held that in a motor carrier contract the primary contractual duty as to safe loading is upon

of the shipper in the pending case was no greater than that of the shipowner in the cited cases.

We reach the conclusion that the contract of Mason & Dixon for the carriage of the goods embraced the liability to indemnify General Electric in case it suffered loss occasioned by the neglect of the carrier; and there remains only for consideration the additional contention of Mason & Dixon that the application of that rule is barred in the pending case by the Workmen's Compensation Act of Tennessee (Tennessee Code § 50-908), which provides that the rights and remedies granted to an employer thereunder on account of personal injury for accidents shall exclude all other rights and remedies of the employee at common law or otherwise on account of such injury. Our attention is called to a number of cases in which somewhat similar language of the workmen's compensation act of a state has been held a bar to a suit against an employer for indemnity by a third person who has been required to pay damages for injuries to an employee, although the injuries were caused primarily by the neglect of the employer and only secondarily by negligence of a third person.[7] Thus, in

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the carrier and that the failure to perform the duty is a weighty factor in identifying the principal offender and saddling him with the liability of indemnitor, notwithstanding the initial negligence of the shipper in loading the goods of which the carrier had notice. See also American District Telegraph Co. v. Kittleson, 8 Cir., 1950, 179 F.2d 946, 952; Orlove v. Philippine Air Lines, Inc., 2 Cir., 1958, 257 F.2d 384, 388, certiorari denied Flying Tiger Line, Inc. v. Philippine Air Lines, Inc., 358 U.S. 909, 79 S.Ct. 230, 3 L.Ed.2d 230; Hunsucker v. High Point Bending & Chair Co., 1953, 237 N.C. 559, 75 S.E.2d 768. In Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, at page 569, 78 S.Ct. 438, at page 442, 2 L.Ed.2d 491, it was pointed out that, in the area of contractual indemnity, an application of the theories of active or passive as well as primary or secondary negligence is inappropriate.

7. See Note, 42 Va.L.R. 959, Contribution and Indemnity: The Effect of Workmen's Compensation Acts. (1956).

Hunsucker v. High Point Bending & Chair Co., 1953, 237 N.C. 559, 75 S.E.2d 768, where the authorities were carefully reviewed, it was held that the Workmen's Compensation Act of North Carolina, G.S. § 97-1 et seq. abrogated both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault and the common-law right of a passively negligent third party to demand indemnity from an actively negligent employer. See also Public Service Electric & Gas Co. v. Waldroup, 1955, 38 N.J.Super. 419, 119 A.2d 172, and Slattery v. Marra Bros., 2 Cir., 1951, 186 F.2d 134, 139, where the same conclusion was reached in respect to the Workmen's Compensation Act of New Jersey, N.J.S.A. 34:15-1 et seq.; Peak Drilling Co. v. Halliburton Oil Well Cementing Co., 10 Cir., 1954, 215 F.2d 368, construing the law of Oklahoma; Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F.2d 784, with respect to the Longshoremen's and Harbor Workers' Compensation Act. It is noticeable, however, that in all of these cases upon which Mason & Dixon relies in the pending suit the courts were careful to point out that the compensation act in question did not bar indemnity when there existed a contractual relationship between the parties whose negligence combined to cause the employee's injuries. Thus it was pointed out in Hunsucker v. High Point Bending & Chair Co., 1953, 237 N.C. 559, at pages 567 and 568, 75 S.E.2d 768, that in the cases in which indemnity to third parties was allowed, the negligent employer was under express contract with the third party or bore some special relationship to him other than that arising out of participation in the joint wrong to the injured employee. This distinction was noted also in Public Service Electric & Gas Co. v. Waldroup, 38 N.J.Super. 419, 119 A.2d 172, at page 181, and Slattery v. Marra Bros., 2 Cir., 1951, 186 F.2d at page 139, and Peak Drilling Co. v. Halliburton Oil Well Cementing Co., 10 Cir., 1954, 215 F.2d

at page 371, and in Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F.2d 784, at page 792.

This distinction was the foundation of the holding in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, from which we have quoted at length, that § 5 of the Longshoremen's and Harbor Workers' Act does not preclude the assertion by the shipowner of the stevedore's contractual liability to him, although the stevedore is the employer of the injured worker. It was pointed out (350 U.S. at page 130, 76 S.Ct. at page 235) that although the Longshoremen's and Harbor Workers' Act protects employers from the claims of employees and those claiming under them, it nowhere excludes the right of a third person to insure himself against liability to the employee either by a bond of indemnity or by an agreement of the employer to save him harmless, which is the essence of a contract wherein one undertakes to perform services for another. In that case the stevedoring contractor for the loading of the vessel was held to embrace such a warranty. In the pending case the agreement of the carrier to see that the equipment was properly loaded before transporting it likewise involved an agreement to indemnify the shipper in case of loss. Similar conclusions had been reached by the courts in cases prior to Ryan. See Burris v. American Chicle Co., 2 Cir., 1941, 120 F.2d 218; Rich v. United States, 2 Cir., 1949, 177 F.2d 688; Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F.2d 784, 792; Westchester Lighting Co. v. Westchester County Small Estates Corp., 1938, 278 N.Y. 175, 15 N.E.2d 567; Whitmarsh v. Durastone Co., D.C.R.I. 1954, 122 F.Supp. 806.

Much reliance was placed in the trial court in the pending case on the decision of Trammell v. Appalachian Elec. Cooperative, D.C.E.D. Tenn. 1955, 135 F.Supp. 512, which was described as the only case interpreting the ex-

clusive liability section of the Tennessee Workmen's Compensation Act. In that case the question now under consideration was broached but not decided. The case involved an action by the administrator of a deceased employee against the Cooperative on account of the death of the employee of a contractor who had agreed to undertake certain operations on behalf of the Cooperative. A third-party action was filed by the Cooperative against the contractor for indemnity but this was dismissed by the court on the ground that the third-party action would lie only if it was based upon contract, the court finding that no such contract existed between the parties. We are told that the Trammell decision was followed in another unreported case in the United States District Court for the Eastern District of Tennessee which is now on appeal. But it does not appear that in either of these cases the court decided what was described in Trammell as the more interesting question—whether in Tennessee an employer may assume liability to indemnify a third person who has injured an employee covered by the compensation act of the state. Furthermore, Trammell was decided before Ryan. We have no reason therefore to suppose that Tennessee will not follow the rule so well established in other jurisdictions which allows indemnity in cases of contract between the employer and the third person; and we do not reach the constitutional question whether the workmen's compensation act of a state may be so construed as to nullify or modify the obligations of a common carrier to a shipper which have been assumed in accordance with acts of Congress passed under the commerce clause of the Federal Constitution, Const. art. 1, § 8, cl. 3.

The judgment of the District Court is accordingly reversed insofar as it dismisses the third-party action of General Electric against Mason & Dixon and the case is re-

manded with directions to enter a judgment against Mason & Dixon in favor of General Electric for the amount of the judgment entered against General Electric in accordance with jury's verdict. In other respects, the judgment of the District Court is affirmed.

Reversed in part, affirmed in part, and remanded.